IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 532.

THE INLAND AND SEABOARD COASTING COMPANY,

PLAINTIFF IN ERROR,

vs.

FRANCIS A. TOLSON.

Motion to rescind judgment entered in this case, to restore case to docket, and amend writ of error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1889.

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THE INLAND AND SEABOARD COASTING COMPANY,
PLAINTIFF IN ERROR.

v.

FRANCIS A. TOLSON.

Now comes the plaintiff in error, by its counsel, and moves the Court to rescind the judgment entered in this case on the 4th day of November, 1889, dismissing the writ of error, and to restore the case to the docket; and also, in pursuance of the provisions of section 1005 of the Revised Statutes, for leave to amend the writ of error by inserting therein, as plaintiffs in error, the names of Henry A. Willard, John W. Thompson, Samuel Norment, and J. H. Baxter, against whom, as well as against the said Inland and Seaboard Coasting Company, the judgment referred to in the writ of error was entered, as appears from the record accompanying the writ of error.

NATH'L WILSON,
of Counsel for Plaintiff in Error.

In submitting this motion for the consideration of the Court it is proper to advert to the fact that the judgment of the court below was rendered in July, 1887, and it is

now too late to sue out another writ. If, therefore, the writ of error should be finally dismissed, it would effectually prevent any examination and determination by this Court of the question of the liability of the plaintiff for the alleged tort, which was the sole subject of the action instituted in the court below, and would require the immediate payment of the very considerable sum for which judgment was obtained.

Furthermore, and independently of the interests of the plaintiff in error, it may be justly said, that it is a matter of very considerable practical importance to the bar of this District, to know the precise form in which writs of error should be taken in order to secure with certainty the review, by this Court, of judgments similar to the one entered in this case.

The rule of court, in pursuance of which it may be claimed the judgment was rendered, was adopted no longer ago than April, 1886, under the statute creating the Supreme Court of the District of Columbia, approved in 1863; and it is not believed that the points of inquiry herein raised with reference to the local law and practice have ever been made the subject of judicial examination.

As the record has not been printed, it may be that material facts have not been brought to the attention of the Court, and the attention of the Court is respectfully asked to the following statement in relation to the proceedings in the court below and to the appendix, which sets forth the judgment entered in the court below, and the rule of court under which the judgment was entered.

It is conceded that where the judgment is against the defendants jointly, one cannot sue out a writ of error

without joining the other defendants, unless there be a summons and severance.

Williams v. *Bank*, 11 Wheat., 414.
Estis v. *Trabue*, 128 U. S., 229.

It is, however, equally well settled, that if there be a separate judgment against one, he is entitled to the writ, although the judgment may also affect the interests of other parties who do not appeal.

Germain v. *Mason*, 12 Wall., 261.
Estis v. *Trabue*, 128 U. S., 229.

It is submitted, that the present judgment relates to two distinct subject-matters, giving rise to two distinct causes of action and involving two distinct judgments.

The plaintiff in error, although a party to each judgment, is such in respect of the different causes of action. The other defendants to the second judgment have no conceivable connection with the first.

The case was an action for negligence, and the sole defendant was the plaintiff in error, The Inland and Seaboard Coasting Company. After verdict and judgment, at the circuit, in order to appeal, the defendant was obliged to give the following undertaking with sureties:

"The defendant, having appealed to the General Term
"from the judgment pronounced herein on the 8th day of
"December, 1886, in the Circuit Court, and J. W. Thomp-
"son, H. A. Willard, Samuel Norment, and J. H. Baxter,
"sureties for said appeal, the defendant for itself, its suc-
"cessors and assigns, the sureties for themselves and each
"of them, their and each of their heirs, executors, and ad-
"ministrators, appearing and submitting to the jurisdiction
"of said General Term, hereby undertake to abide by and

" perform and pay its judgment, which they agree may be
" pronounced against all of them.

" The Inland and Seaboard Coast-
" ing Company of the D. of Co.,
" by J. W. THOMPSON, *President*,
" J. W. THOMPSON.
" H. A. WILLARD.
" SAM'L NORMENT.
" J. H. BAXTER.

" Approved :
" A. B. Hagner.
" December 18, 1886.
" Filed December 18, 1886."

The judgment appealed from, entered at the circuit, was as follows :

" Francis A. Tolson, plff.,
v.
" Inland and Seaboard Coasting Company, Deft. } *At Law.* *No.* 25,170.

" Now, again, come here the parties aforesaid, in manner
" aforesaid, and the same jury that was respited yesterday,
" who, after the case is given them in charge, on their oath
" say that they find said issue in favor of the plaintiff, and
" assess his damages by reason of the premises at the sum
" of eight thousand dollars, besides costs ; therefore it is
" considered that the plaintiff recover against said defend-
" ant eight thousand dollars for his damages in manner and
" form as aforesaid assessed and $ for his costs of
" suit, and have execution thereof."

This judgment was affirmed in the general term.

The judgment in the general term will be found to be, *first*, a judgment of *affirmance* of the judgment below. The language is, " *the motion for a new trial on exceptions* " *is now overruled and the judgment of the court in special* " *term is affirmed with costs.*"

The court then declares:

"And it is further adjudged that the plaintiff recover "upon his said judgment, to wit, the sum of eight thou- "sand dollars as of the date of the said *judgment* of the "special term and the costs as well against the said de- "fendant, and as against Henry A. Willard, John W. "Thompson, Samuel Norment, and J. H. Baxter, its "sureties, on said appeal to this Court, and have execu- "tion against them and each of them."

See Appendix.

It will be observed then, that in *respect of the suit*, the court affirmed the judgment against the plaintiff in error.

It then takes up and considers the undertaking and proceeds to render judgment upon it.

The court had before it, therefore, two causes of action, *first*, the tort sued for, and, *secondly*, the undertaking, or contract, given in the progress of the cause, in pursuance of the rule of the court.

Are not these two causes of action, the tort and the contract, absolutely distinct? The first is several, or against one; the second may be for the present assumed to be joint.

The plaintiff in error, appealing from the first, can not assign error in respect of the second, assuming it to be joint. The parties affected by the second, if that alone was appealed from and brought here, could not assign error in respect of the first.

There are, in fact, and in law, two judgments. The defendants in the second judgment occupy precisely the same relation to the judgment they would occupy if, instead of a judgment rendered in the same cause on the undertaking, there was a separate suit to enforce the undertaking after a judgment rendered for the tort.

In such a suit it is plain that the parties to the undertaking could not show error in the suit in which the undertaking was given, and they can no more show it here than in such separate suit. The defendants in the undertaking are proceeded against by reason of the contract. They have said, we agree that if the judgment appealed from be affirmed, judgment may be rendered against us, and upon this contract judgment is rendered. The sureties were no parties to the tort suit, and although the plaintiff in error was a party to both, it is proceeded against in distinct capacities, in the suit, as a tort feasor, and, on the undertaking, as a party to a written contract.

It is true that the better practice might be to take out two writs of error, or one writ in which the present plaintiff in error would sue in the double capacity, and thus bring before this Court error in respect of both the tort and the contract. The fact, however, that no error can be assigned here, as to the contract, constituted no reason why the separate judgment as to the tort should not be here re-examined and, if erroneous, reviewed.

The rule of court referred to is a remarkable exercise of power on the part of the court below. The parties to the undertaking have no day in court.

In New York, an undertaking by the appellant and his sureties has, to a great extent, taken the place of a bond in error, but suit must then be brought on the undertaking.

The legal character of such an undertaking was fully examined by the Court of Appeals of that State in the case of *Robinson* v. *Plimpton* (25 N. Y., 484). There the language of the undertaking was to pay, if the judgment should be affirmed. The general term reversed, but the Court of Appeals reversed the judgment of the general term, and it was held that the parties to the undertaking

were bound. Here the language of the undertaking is to pay, if the judgment *be* affirmed by the general term, not generally, as in the New York case.

It is plain that some provision should have been made, by the rule, as to cases brought to this Court. The plaintiff in error ought not to suffer for the omission of the court in respect of the rule.

It was undoubtedly supposed by the court below, as it was supposed by the plaintiff in error, that the supersedeas bond, given by it in the penalty of , and approved by , took the place of the undertaking given to secure the removal of the case to the court in general term.

In view of the fact that the sureties in the undertaking did not join in the undertaking, it may be asked, what would become of the second judgment if the writ of error should not be dismissed? The answer is twofold. First, the question here is solely whether the writ should be dismissed, whatever consequences may result from the second judgment. But, secondly, the plaintiff in error being rightfully here, and having given a supersedeas bond, a stay of execution would doubtless be granted to prevent action on the second judgment, or relief may be had in equity.

The supersedeas bond, given when the case was brought here, is primarily liable for the amount of the judgment. This subject was fully examined by Chief-Justice Church in *Hinckley* v. *Kreig* (58 N. Y. 584), where there were two sets of sureties, as here.

The foregoing remarks are based upon the assumption that the second judgment, that is, the judgment against the plaintiff in error and its sureties, is joint. But is this so?

The terms of the judgment are that the plaintiff recover upon the judgment, entered at the special term, against

the defendant and its sureties, "*and have execution against "them and each of them.*"

These words authorize execution against either. At common law the execution had to be against all, although it might be levied upon any one. Where, as in this case, a judgment provides that execution may be sued out against all or either of them, referring to the persons named in the judgment, this necessarily means that the judgment is joint and several. If it is several, then certainly each one of the persons against whom it is rendered has a right to sue out a separate writ of error in his own name.

In the case of *Estis* v. *Trabue*, 128 U. S., 229, this Court said:

"There is nothing distributive in the judgment, so that "it can be regarded as containing a separate judgment "against the claimants and another separate judgment "against the sureties, or as containing a judgment against "the sureties payable and enforceable only on a failure to "recover the amount from the claimants; *and execution is "awarded against all of the parties jointly.* In such a case "the sureties have the right to a writ of error."

If, however, this Court shall be of opinion that the judgment referred to in the writ of error was not a separate judgment against the plaintiff in error, and a separate judgment against the persons named therein as sureties, but was a joint judgment against the plaintiff in error and the sureties, then it is submitted, that the writ of error may be amended, under the authority conferred by section 1005 of the Revised Statutes, which provides that--

"The Supreme Court may, at any time, in its discretion, "and on such terms as it may deem just, allow an amend-"ment of a writ of error, when there is a mistake in the "teste of the writ, * * * or when the statement of

" the title of the action or *parties thereto* in the writ is " defective, if the defect can be remedied by reference to " the accompanying record, and in all other particulars of " form: *Provided*, The defect has not prejudiced, and the " amendment will not injure, the defendant in error."

In the case of *Pearson* v. *Yewdall* (95 U. S., 294) this Court in deciding a motion made to amend the writ of error by making the city of Philadelphia a party thereto, said:

" Section 1005 of the Revised Statutes authorizes this " Court in its discretion, and upon such terms as it may " deem just, to allow an amendment of a writ of error " when the statement of the parties thereto is defective. " The right of a party to amend is not absolute, but it is " to be granted by the Court in its discretion. Whether " it should be granted in a particular case must depend " upon the attending circumstances."

In the case of *Morris* v. *Simonds* (100 U. S., 145) it was held that when an appeal should have been taken in the name of the individual members of a firm and the record showed who were the members of the firm, the defect might, under section 1005 of the Revised Statutes, be cured by an amendment substituting their names.

In the case of the Knickerbocker Life Insurance Company, reported in 112 U. S., 696, after the case was decided, the Court discovered that the writ of error was sued out against only one of several plaintiffs below.

The Court thereupon made the following orders:

" Order, March 23, 1885.

" It appearing by the record in this case that the writ " of error and citation were against P. A. Pendleton only,

" whereas, the judgment below was in favor of said Pen-
" dleton and three other persons, and no summons and
" severance; it is, therefore, ordered that the plaintiff in
" error show cause on Monday, the 16th day of April next,
" why the judgment rendered herein on the 5th day of
" January last should not be vacated and the writ of error
" dismissed; and the clerk is directed to serve a copy of
" this rule on the respective parties or their attorney by
" mail."

"Order, April 13, 1885.

"It appearing to the Court that the writ of error in this
" case is defective in the statement of the title of the action
" below and the parties thereto, in this: that P. A. Pen-
" dleton is named as plaintiff below, whereas the plaintiffs
" were Pleasant H. Pendleton, Caroline E. Dixon and her
" husband, Charles V. Dixon, Mary E. Pendleton, and
" Francis M. Pendleton, and it appearing that the said
" mistake was an oversight and did not affect the proceed-
" ings or argument of the cause;

"It is ordered that the writ of error may be amended
" by inserting the names of the omitted plaintiffs below,
" and that a citation issue to them returnable to the 20th
" instant; and that the defendants in error have leave to
" enter an order for a rehearing of the case at the next
" Term of the Court, if they shall elect to do so during the
" present Term, and that neither party recover costs on
" these motions."

The judgment previously entered was set aside and the cause restored to the docket for reargument at the next term, and was then re-argued and decided.

See Book 28, L. C. P. Co., Ed. 870, 115 U. S., 339.

It is respectfully submitted, that in view of the provisions of the statute and of the decisions of this Court, above referred to, the motion to amend the writ of error in this cause should be allowed.

If the Court should desire to inspect the record, before passing upon the motion, the plaintiff in error will cause it to be printed without delay.

NATH'L WILSON,
for the Plff in Error.

APPENDIX.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

[Marginal:] Judgment of the General Term.

IN GENERAL TERM.

FRANCIS A. TOLSON, Plaintiff,
v.
THE INLAND & SEABOARD COASTING COMPANY, Defendant.
} *At Law.* *No.* 25,170.

Now again come here as well the plaintiff as the defendant by their respective attorneys, whereupon it appearing to the Court that the defendant's exceptions to the admissibility of evidence and to the rulings and instructions of the Court in special term were not well taken; and the defendant by its counsel having, in open court, abandoned its various appeals and applications for new trial on other grounds, the motion for a new trial on exceptions is now overruled and the judgment of the Court in special term is affirmed with costs. And it is further adjudged that the plaintiff recover upon his said judgment, to wit, the sum of eight thousand dollars as of the date of the said judgment of the special term and the costs as well against the said defendant, and as against Henry A. Willard, John W. Thompson, Samuel Norment, and J. H. Baxter, its sureties, on said appeal to this Court, and have execution against them and each of them.

By the Court:

E. F. BINGHAM,
Chief Justice.

[Marginal:] Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Chief Justice and Justices of the Supreme Court of the District of Columbia, Greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Francis A. Tolson, plaintiff, and The Inland and Seaboard Coasting Company, defendant, being No. 25,170, at law, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears; and it being fit that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Morrison R. Waite, Chief Justice of the United States, this 20th day of July, in the year of our Lord 1887, and of the Independence of the United States the one hundred and twelfth.

R. J. MEIGS, *Clerk.*

[Marginal:] Rules of the Supreme Court of the District of Columbia, adopted at the January Term, 1886.

89. Upon an appeal to the General Term the court shall review the order, judgment, or decree appealed from, and affirm, reverse, or modify the same as shall be just.

No order, judgment, or decree of any of the courts held by a single justice shall be reviewed in the General Term unless the appeal be taken and perfected within twenty days, Sundays excluded, after the order, judgment, or decree complained of shall have been made or pronounced; and no appeal shall be considered as taken and perfected unless taken in open court and entered on the minutes, or entered in writing in the clerk's office, and an appeal bond or undertaking be given and approved by the court or a justice thereof, which shall be sufficient, at least, to cover the costs of the appeal.

No such appeal shall operate, except in cases where the District of Columbia is appellant, as a stay or supersedeas of execution, unless the same be taken and perfected within ten days, Sundays excluded, after the day of the date of the judgment, order, or decree appealed from, in the manner following, viz: Where the judgment is for a specific sum of money, the appellant, with one surety or more, to be approved by the court, or one of the justices, shall, within the ten days aforesaid, execute and file in the cause an undertaking in the following form, substantially:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,
the — day of ——, 18—.

A. B., PLAINTIFF,
v.
C. D., DEFENDANT. } *At Law. No.* —.

The defendant [*plaintiff*], having appealed to the General Term from the judgment [*decree*] pronounced against him by the Circuit Court [*in the special term*] on the — day of ——, 18—, and —— his surety, for themselves and each of them, their and each of their heirs, executors, and administrators appearing and submitting to the jurisdiction of the said General Term, hereby undertake to abide by, perform, and pay its judgment [*decree*] which they agree may be pronounced against all of them.